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# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1993

KAREN LIVADAS

*Petitioner,*

VS.

LLOYD W. AUBRY, JR.,
IN HIS OFFICIAL CAPACITY AS
LABOR COMMISSIONER
FOR THE STATE OF CALIFORNIA

*Respondent.*

On Petition For Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

## SUPPLEMENTAL BRIEF BY RESPONDENT IN REPLY TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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## STATEMENT

### A. *The Solicitor General's Brief Poses And Answers A Different Question From That Addressed By The Ninth Circuit's Decision*

The Solicitor General, with all due respect, has, in the opinion of the Labor Commissioner, misstated the question when he presented the following for review:

> Whether petitioner may sue the California Labor Commissioner for injunctive relief and damages under 42 U.S.C. 1983, for refusing to prosecute her state wage-and-hour claim based on her status as an employee covered by a collective bargaining agreement containing an arbitration clause? (Br. of Amicus, i)

As the California Labor Commissioner has pointed out in his prior brief to this Court, the correct question posed by this case to reach the issue addressed by the Ninth Circuit is:

> May a state agency refuse to adjudicate claims filed by workers employed under the terms of collective bargaining agreements containing arbitration clauses when state law prohibits the agency from entertaining any claims involving any dispute regarding the interpretation or application of any collective bargaining agreement containing an arbitration clause? (Br. in Opp. i)

## DISCUSSION

### A. *There Can Be Little Doubt That The Question Posed By The Solicitor General Requires The Conclusion Reached In The Amicus Curiae Brief*

The question posed by the Solicitor General requires, of course, the conclusion reached in his brief. There's little doubt, based upon a fair reading of current caselaw, that if the refusal to prosecute Livadas' claim was simply based upon her status as an employee covered by a collective bargaining agreement containing an arbitration clause, the Labor Commissioner's actions would be preempted by the federal law. However, such was not the question addressed by the Ninth Circuit nor is that the policy of the Commissioner. As the majority opinion in the Ninth Circuit recognized, Livadas argued that the Commissioner deprived her of her right to bargain collectively because he denied her enforcement of



certain sections of the California Labor Code based on his determination that adjudicating her dispute would concern the interpretation or application of a collective bargaining agreement containing an arbitration clause. (Pet. App. 2a)

The majority of the panel in the Ninth Circuit went on to correctly state that: "The Commissioner's policy is not to adjudicate any dispute *concerning the interpretation or application* of any collective bargaining agreement containing an arbitration clause." (Pet. App. 8a) As the panel further found, Livadas did not object to this policy of the Commissioner "because she concedes that the Commissioner's enforcement policy under those circumstances would be preempted by federal labor law." (Pet. App. 8a)

Thus, summarizing the majority decision, the panel found the Commissioner refused to adjudicate Livadas' state-law claim based upon his finding that such adjudication would require the *interpretation* and/or *application* of the terms of the collective bargaining agreement. Livadas contended, as the Ninth Circuit stated, that the Labor Commissioner's legal conclusion that he had no jurisdiction was incorrect. (Pet. App. 11a) The Ninth Circuit then responded:

> Livadas is left, then, with the simple claim that the Commissioner erroneously interpreted his own policy. That amounts only to a state law claim that she is in fact eligible for the Commissioner's enforcement under California Labor Code §229. *The appropriate relief would be a writ of mandate for the California Courts*, see *Baker v. Aubry*, 216 Cal.App.3d 1259, 265 Cal.Rptr. 381 (1989), *review denied*, Mar. 15, 1990, *cert. denied*, 111 S.Ct. 66 (1990) and she could seek such relief on the ground that the Commissioner misinterpreted §229. A misinterpretation of a pefectly valid state statute, however, does not provide grounds for federal relief. (Pet. App. 12a, emphasis added)

### B. *Review Of Whether The Facts In Livadas' Claim Required Interpretation Or Application Of A Collective Bargaining Agreement Which Requires Arbitration Does Not Warrant Certiorari*

As detailed in the Commissioner's Brief in Opposition to Certiorari (See Br. in Opp. 6-7), California law requires that the failure to pay wages at time of discharge be "willful" before the right to penalty wages arises under Labor Code §203. A "willful" failure to pay is not present when the employer is able to present any "good faith dispute" as to whether wages are due. (Title 8, California Code of Regulations, §13520)

The policy of the Labor Commissioner regarding the provisions of Labor Code §229[1], is, as the Ninth Circuit found, not only consistent with, but, in fact, "required under federal law." (Pet. App. 11a) The application of that policy by the Labor Commissioner on a case-by-case basis is subject to review by the California courts.

Both the dissenting judge in the Ninth Circuit and the Solicitor General rest their analysis on a conclusion which they consider obvious — "it is not necessary to refer to the collective bargaining agreement to determine whether Safeway paid petitioner immediately upon termination as required by state law." (Br. of Amicus, 13) The problem, which neither the dissent nor the Solicitor General address, is how, in a case such as that presented by Livadas, the Labor Commissioner (or any trier of fact) is to determine (1) how much, if any,

[1]California Labor Code §229 provides:

> Actions to enforce the provisions of this article for the collection of due and unpaid wages claimed by an individual may be maintained without regard to the existence of any private agreement to arbitrate. This section shall not apply to claims involving any dispute concerning the interpretation or application of any collective bargaining agreement containing such an arbitration agreement.



wages were due the worker at time of termination; (2) whether the failure to pay the worker was willful as that term is used in the California law, and (3) the appropriate wage rate to be used in determining the penalty wage, without both interpreting and applying the terms of the collective bargaining agreement.

The task of making these determinations is complicated in this case, as in most cases involving a collective bargaining agreement, where the CBA provides for two general employee classifications, eleven separate subclassifications in each of the general classifications, bonus pay, shift differential, termination pay and overtime compensation provisions[2]. The simple statement to the effect that one need not look to the CBA to determine the validity of the claim is misleading when one considers all of the issues involved.

More importantly, this is not the sort of legal disagreement which is worthy of review by this Honorable Court.

### C. *The California Labor Commissioner's Policy Does Not Provide A Blanket Preclusion Of Enforcement Of Wage-And-Hour Claims Of Individuals Subject To CBAs Containing Arbitration Clauses*

Contrary to the conclusion reached by the Solicitor General, the California Labor Commissioner has <u>not</u> adopted a general rule that he does not enforce wage-and-hour claims of individuals covered by collective bargaining agreements containing arbitration clauses. (See Br. of Amicus, 13) As outlined above, the state statute (Labor Code §229) simply precludes the Labor Commissioner (or the California courts) from exercising any jurisdiction over a claim which requires

[2]Among the exhibits submitted by Livadas below is a copy of the applicable CBA reflecting all of these facts.

the *application* or *interpretation* of the terms of a collective bargaining agreement which contains an arbitration clause.

The Labor Commissioner has always exercised jurisdiction over cases involving the payment of wages to workers covered by collective bargaining agreements containing arbitration clauses where the inquiry did not require the application or interpretation of the CBA.

In the legal opinion of the California Labor Commissioner, the adjudication[3] of the claim filed by Livadas for recovery of penalties under the provisions of California Labor Code §203[4] would require the interpretation and application of the terms and conditions of the collective bargaining agreement between her employer and her union. In the event that the legal conclusion reached by the California Labor Commissioner in this particular case was incorrect, it was an incorrect interpretation of the California law; not the result of "a general rule that exceeds the scope of federal preemption." (Br. of Amicus, 13)

Thus, in the event that the legal conclusion of the Labor Commissioner was (arguably) erroneous, the remedy available

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[3]The Solicitor General, in framing his question, uses the word "prosecute" to describe the action of the California Labor Commissioner. It is possible that the Solicitor General misunderstands the role of the Labor Commissioner. As the Ninth Circuit pointed out, it is an adjudicatory process which is at issue here. The California Labor Commissioner has both prosecutorial and quasi-judicial powers. (See California Labor Code §98(a) and §98.3, for instance) The Labor Commissioner declined to exercise his adjudicatory power in this case.

[4]The provisions of the applicable Labor Code sections are set out in Respondent's Brief In Opposition To Petition For Writ of Certiorari. Contrary to the conclusion reached by the Solicitor General, simply determining the rate of pay as provided in the CBA is not sufficient to adjudicate Livadas' claim. The question of willfulness and the correct wage rate to be applied to determine the penalty must also be addressed.



to the petitioner is, as the Ninth Circuit indicated, correctly addressed to the California courts by writ of mandate.

## CONCLUSION

The Ninth Circuit Court of Appeals, based on the facts in the record, correctly framed the question which was to be addressed in this case and, based on that question, correctly determined that petitioner failed to state a federal cause of action.

Reframing the question as the Amicus Curiae Brief of the Solicitor General does, simply disregards the facts in the case and the issues addressed by the Court of Appeals. The question, as reframed by the Solicitor General, demands but one answer — that which the Solicitor reaches; but that question does not address the underlying issue in the case: May a state agency refused to adjudicate a state law claim which requires the *interpretation* or *application* of a collective bargaining agreement if that CBA contains an arbitration clause?

Respectfully submitted,

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